A **MUHAMED KHAIRUL AKMAR MOHAMED SHAHID v. PP**

HIGH COURT MALAYA, IPOH
SU TIANG JOO JC
[CRIMINAL APPEAL NO: AA-42S(A)-1-06-2019]
15 DECEMBER 2020

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CRIMINAL LAW: *Corrosive and Explosive Substances and Offensive Weapons Act 1958 – Section 6(1) – Possession of small curved knife and machete – Whether place where offence took place fell within meaning of 'public place' – Interpretation of – Whether requirements under s. 173(ha) of Criminal Procedure Code fulfilled – Whether ingredients of charge met*

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CRIMINAL PROCEDURE: *Sentencing – Appeal against – Accused found guilty of being in possession of offensive weapons – Whether ingredients of charge met – Whether requirements under s. 173(ha) of Criminal Procedure Code fulfilled – Mitigating and aggravating circumstances considered – Whether there was reason to disturb sentence*

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The appellant was charged under s. 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 ('Corrosive and Explosive Substances Act') for having in his possession a kerambit (small curved knife) and a parang (machete). The Sessions Court Judge found the appellant guilty and sentenced him to seven years imprisonment and whipping of one stroke. In his appeal, the appellant submitted that he was charged with having in his possession the said offensive weapons in a black bag at a mosque in PGA Camp Ulu Kinta and that upon the definition of 'public road' in the Road Transport Act 1987, the place where the weapons were found with the appellant did not fall within the meaning of public road. The appellant submitted that as the place where the alleged offence took place was in a restricted zone and not a public road or place, one of the essential ingredients for the charge was not met and by reason thereto, the appellant ought to be acquitted and released. The appellant further argued that the Sessions Court, having found that the prosecution had made out a *prima facie* case at the close of the prosecution's case, did not inform and explain the three options available to the appellant, that he had (i) a right to remain silent; (ii) a right to give unsworn evidence; and (iii) a right to give sworn evidence, as required under s. 173(ha) of the Criminal Procedure Code, which, according to the appellant, was a fatal irregularity.

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Held (dismissing appeal):

(1) The interpretation of the term 'public place' ought to be one that is wide enough to include a place where the public can secure regulated admission such as by payment, by permission with or without conditions. The Masjid Saidina Abu Bakar Ulu Kinta located within the police camp, Markas Briged Utara Pasukan Gerakan Am, is a public place as the public can have access to it, *albeit* with permission. Such an

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interpretation would promote the intention of the Act in the interest of the safety of the public in general in dealing with the presence of corrosive and explosive substances in a public place and reliance is placed upon s. 17A of the Interpretation Acts 1948 and 1967 where a mode of construction which would promote the purpose or object underlying the Act whether expressly stated or shall be preferred to that of a construction that would not. In the case of the Corrosive and Explosive Substances Act, it is expressly stated in its preamble to be an Act to provide certain penalties for unlawful possession of corrosive and explosive substances and the carrying of offensive weapons and such a purpose or object should be at the forefront of the mind of the court when hearing cases of this nature. (paras 36-38)

(2) On 27 March 2019, after the Sessions Court Judge had given her decision, the interpreter could be seen going up to the accused who was dressed in a dark blue shirt and who was in the dock and speaking to the accused. From the recording of 17 April 2020, the interpreter could be heard saying that 'Tiga pilihan telah diterangkan pada tarikh yang lepas' (the three options had been explained to the accused on the previous date). Therefore, the three options had been explained to the appellant and the assertion of there being a serious irregularity in the proceedings by reason of a failure to do so was wholly misplaced and unmeritorious. Further, it had been settled in the case of *Hamzah Osman lwn. PP* that a failure to explain the options available to the accused was not fatal if the accused was represented by counsel. In this case, the accused was indeed represented by an experienced counsel and in the circumstances, any failure to explain the three options would not in any event had caused any prejudice to the appellant. (paras 48-50)

(3) In passing sentence, the Sessions Court Judge had taken into account the appellant having no prior conviction, that the offence was a serious one and the prosecution had pressed for a heavy sentence. In the circumstances, with the added factor of the offence having taken place in the vicinity of a place of worship, there was no reason to disturb the sentence. (para 53)

Case(s) referred to:

Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Hamzah Osman lwn. PP [2016] 5 CLJ 18 CA ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Marimuthu Seringan lwn. PP [2016] 1 LNS 64 CA ***(refd)***
Md Ariff Muzaker Riduan lwn. PP [2017] 1 LNS 595 HC ***(refd)***
Mohamad Khairul Azrin Khairi lwn. PP & Kes Satu Lagi [2017] 1 LNS 1087 HC ***(refd)***
R v. Kane [1965] 1 All ER 705 ***(refd)***
Selva Vinayagam Sures v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 2 CLJ 29 FC ***(refd)***
Yii Ming Tung v. PP [2014] 9 CLJ 1102 CA ***(refd)***

A **Legislation referred to:**
Corrosive and Explosive Substances And Offensive Weapons Act 1958, ss. 2, 6(1)
Criminal Procedure Code, ss. 173(f)(i), (ha), 180(1), 311, 315, 316, 317, 323, 325, 326
Federal Constitution, art. 122AB(1)
Interpretation Acts 1948 and 1967, s. 17A

B *For the appellant - Ranjit Singh Sandhu & Privesh Paul Singh; M/s Ranjit Singh Sandhu & Co*
For the respondent - Maziyah Mansor; DPP

Reported by Suhainah Wahiduddin

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JUDGMENT

Su Tiang Joo JC:

Introduction

D **[1]** Is the mosque in a police camp, the Markas Briged Utara Pasukan Gerakan Am, which is a restricted area but where members of the public may gain access only with permission, a public place?

The Charge

E **[2]** The appellant was charged under s. 6(1) Akta Bahan-Bahan Kakisan dan Letupan dan Senjata Berbahaya 1958 (Act 357). The charge reads as follows:

> **Pertuduhan**
>
> Bahawa kamu pada tarikh 4 Jun 2018, jam lebih kurang 1500 hrs di dalam
F Masjid Kem PGA Ulu Kinta, di dalam Daerah Kinta, di dalam Negeri Perak, memiliki senjata kerambit dan juga parang di dalam beg warna hitam dan porches celoreng milik kamu. Oleh yang demikian kamu melakukan satu kesalahan yang boleh dihukum di bawah s. 6(1) Akta Bahan-Bahan Kakisan dan Letupan dan Senjata Berbahaya 1958.

G **[3]** The preamble of the Corrosive And Explosive Substances And Offensive Weapons Act 1958 (Revised 1988) (Act 357) (hereinafter called "Act 357") provides that it is an Act to provide certain penalties relating to the unlawful possession of corrosive and explosive substances and the carrying of offensive weapons. Section 6(1) of Act 357 provides as follows:

H > Any person who in any public road or place carries or has in his possession or under his control any offensive weapon otherwise than with lawful authority or for a lawful purpose shall be guilty of an offence and on conviction be liable to imprisonment for a term of not less than five years and not more than ten years, and to whipping.

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Trial And Sentence In The Sessions Court

[4] After eight days of trial, the learned Sessions Court Judge found the appellant guilty and sentenced him to seven years imprisonment and whipping of one stroke.

Appeal

[5] Two grounds were raised by the appellant in his written submissions in support of his appeal; namely, (i) that the place where the alleged offence took place was neither a public road or place and (ii) there was a failure by the learned Sessions Court Judge to appreciate the defence case.

[6] For purposes of this judgment, the words "appellant" and "defence" is used interchangeably.

Two Grounds - (i) Not A Public Road Or Place And (ii) Failure To Comply With Section 173 (ha) Criminal Procedure Code ("CPC")

[7] During oral submissions, the appellant submitted that he is advancing two grounds; namely, that as the place where the alleged offence took place was in a restricted zone and not a public road or place, one of the essential ingredients for the charge was not met and by reason thereto, the appellant ought to be acquitted and released. Secondly, that the Sessions Court Judge after having found that the prosecution had made out a *prima facie* case at the close of the prosecution case did not inform and explain the three options available to the appellant as required under s. 173(ha) of the CPC and the appellant submitted this is a fatal irregularity.

[8] It is common ground that the phrase "public road or place" is not defined in Act 357.

[9] The appellant relied upon the definition of road in the Road Transport Act 1987 which defined "road" to mean as follows:

> (a) any public road and any other road to which the public has access and includes bridges, tunnels, lay-bys, ferry facilities, interchanges, round-abouts, traffic islands, road dividers, all traffic lanes, acceleration lanes, deceleration lanes, side-tables, median strips, overpasses, underpasses, approaches, entrance and exit ramps, toll plazas, service areas, and other structures and fixtures to fully effect its use;
>
> (b) for the purposes of section 70 and 85, also includes a road under construction; and
>
> (c) for the purpose of sections 41, 42, 43, 44, 45 and 45A, also includes a parking place.

[10] As for public place, reliance was placed upon the Interpretation Acts 1948 and 1967 where the following definition for public place is prescribed:

> "public place" includes every public highway, street, road, bridge, square, court, alley, lane, bridle way, footway, parade, wharf, jetty, quay, public garden or open space, and every theatre, place of public entertainment of any kind or other place of general resort to which admission is obtained by payment or to which the public have access.

[11] Emphasis was placed by the appellant on the phrase "to which the public have access."

[12] It is the appellant's submission that he was charged with having in his possession a kerambit (a small curved knife) and a parang (machete) in a black bag at the mosque in PGA Camp Ulu Kinta. Based upon the definition of public road in the Road Transport Act 1987, the place where the weapons were found with the appellant, did not fall within the meaning of public road as stated.

[13] The appellant further submitted that similarly, under the Interpretation Acts 1948 and 1967, a public place is one to which the public have access and the mosque in the PGA Camp is one where the public do not have access save with permission.

[14] The appellant in his written submissions (encl. 13) at para. [16] submitted that the camp area [is a] public place. The court was satisfied that this was an obvious typographical error in that what the appellant meant is that the camp area is "not" a public place.

Factual Background

[15] To give context to the judgment herein, the following factual background would be useful.

[16] SP2, the senior officer of the Komando Pasukan Gerak Khas Ulu Kinta Perak, ASP Hamzah bin Abdul Rani was the complainant. At about 3.30 in the afternoon, on 4 June 2018, he had received a telephone call from SP3, the senior supervisor, Sergeant Major Dihanan bin Angkak at Unit 69 Komando Charlie Skuadron about a fight at Masjid Saidina Abu Bakar between a member of Skuadron Charlie; namely, the appellant and a member of the public by the name of Mohd Hamdan bin Meli.

[17] When both SP2 and SP3 went to the mosque which was the scene of the incident, a kerambit was handed over to them by a member of the public who said he was attacked with that weapon by the appellant. SP2 and SP3 also found a black bag which the appellant admitted was his. In the bag was a sheathed parang which is the personal belonging of the appellant.

[18] The appellant was brought to the (police) station and SP2 made a police report on the incident. Both the appellant and the items seized were handed over by SP2 to the investigating officer, SP4, Inspector Rinosha a/p M Selvadurai.

[19] After investigation, the appellant was charged with the charge aforesaid.

Prima Facie Case And Standard Of Proof

[20] Upon the conclusion of the prosecution case, the learned Sessions Court Judge held that the prosecution had made out a *prima facie* case sufficient for the appellant to enter his defence with reliance placed upon the provisions of s. 180 of the Criminal Procedure Code (Act 593) on the need for the prosecution to make out a *prima facie* case before calling upon the accused to enter his defence. Reliance was also placed by the Sessions Court Judge upon the authorities of *Balachandran v. PP* [2005] 1 CLJ 85 at 89 and *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 CA on what amounts to a *prima facie* case as reproduced below:

i) *Balachandran*'s case:

> A *prima facie* case is therefore one is sufficient for the accused to be called upon to answer. This is turn means that the evidence adduced must be such that it can be overthrown only be evidence in rebuttal.

ii) *Looi Kow Chai & Anor*'s case:

> It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

The Kerambit And Parang

[21] From the testimony of SP2, a kerambit was handed over to him at the place of the incident by a man (AR Vol 2 p 11 lines 7 and 8 and p 22 lines 9 and 10). He later testified that upon opening a bag which the accused admitted was his, he found amongst other items, a parang and a kerambit (AR Vol 2 p 12 lines 12 to 15) but although he did admit that it was a mistake that the kerambit was found in the appellant's bag (AR Vol 2 p 23) he went on to say the parang was in (the appellant's) bag (AR Vol 2 p 23) and one Hamdan handed over the kerambit to him (AR Vol 2 p 23.) The appellant was alleged to have had a fight with this Hamdan.

[22] SP3 testified that a kerambit was handed over to SP2 by someone other than Hamdan (AR Vol 2 p 28). However, he corroborated SP2's testimony when he testified that there was a parang in the (appellant's) bag (AR Vol 2 p 30 line 6) and a sheath for a kerambit.

[23] With the appellant admitting that the bag wherein a parang was found was his and with SP2 (AR Vol 2 p 10) and SP3 (AR Vol 2 pp 28 and 29) clearly identifying the appellant together with his bag at the place of the incident, and although, it is not clear from the notes of evidence whether the kerambit was the appellant's especially with Hamdan not having been called as a witness, what is however, clear beyond reasonable doubt is that the parang was found in the appellant's bag, a type of bag which is issued to members of the Unit 69 Komando, of which the appellant was a member (AR Vol 2 p 27 lines 10 to 13 and at p. 30 last line).

[24] That a parang is an offensive weapon is indisputable.

Public Place

[25] The learned Sessions Court Judge held that three elements were required to be proved, namely:

(i) that the accused was in possession of the weapons at the place of the incident without lawful authority;

(ii) that the weapons were offensive weapons within the provisions of s. 2 of Act 357; and

(iii) the place of the incident was a public place.

[26] Under s. 2 of Act 357 "offensive weapon" includes any instrument which if used as a weapon of offence is likely to cause hurt.

[27] The defence assailed the charge on the premise that the scene of the incident; namely, the mosque, *to wit*, Masjid Saidina Abu Bakar Ulu Kinta located within a police camp, Markas Briged Utara Pasukan Gerakan Am, which has a clear sign saying "Pemberitahu, Kentonmen Ini Telah DiWartakan Sebagai Kawasan Dan Tempat Larangan Mengikut Akta Kawasan Dan Tempat Larangan 1959 DiWartakan pada 23 Januari 1969" is a restricted place as gazetted pursuant to the Protected Areas and Protected Places Act 1959 (Act 298), is not a public place.

[28] The defence placed reliance upon the testimony of SP2 who during cross-examination, agreed that the camp area is tightly guarded and members of the public are not allowed to enter as and when they like. SP2 testified:

> Saya setuju kawasan kem sangat ketat kawalannya dan orang awam tidak boleh masuk sesuka hati.

[29] The learned Sessions Court Judge disagreed. Her Honour found from the evidence given by the prosecution's witnesses, that the mosque is a public place where members of the public can have access to worship and the use of the mosque was not restricted to only members of the camp.

Evidence Led On Use Of The Mosque

[30] Upon perusing the notes of proceedings, the following relevant evidence can be found:

(i) SP2 - (AR Vol 2 p 18 lines 9 & 10) - Masjid PGA Ulu Kinta adalah untuk kegunaan pegawai, anggota dan orang awam yang berada di luar kem. Semua boleh guna.

(ii) SP2 - (AR Vol 2 p 22) - Saya setuju kawasan kem sangat ketat kawalannya dan orang awam tidak boleh masuk sesuka hati. Jika orang awam nak masuk dalam kem perlu dapatkan pas dari guard di pintu utama.

(iii) SP2 - (AR Vol 2 p 24) - Saya setuju kem bukan tempat awam yang orang awam boleh bebas masuk. Saya setuju kem bukan tempat awam kerana terdapat senjata api di dalam kem.

(iv) SP2 - (AR Vol 2 p 25) - Kem boleh dimasuki oleh orang awam dengan tujuan yang tertentu samada untuk ke masjid atau ke berek kelamin. Untuk ke masjid tidak perlu ambil pas.

(v) SP2 - (AR Vol 2 p 33) - Setuju masjid adalah untuk anggota di kem? Saya tidak setuju.

(vi) SP3 - (AR Vol 2 p 33) - Setuju masjid di kawasan kem? Saya setuju.

(vii) SP3 - (AR Vol 2 p 33) - Setuju secara umumnya jemaah masjid majoriti anggota kem? Saya setuju.

(viii) SP2 - (AR Vol 2 p 34) - Setuju masjid kepunyaan dan kelolaan kem? Hanya sebahagian sahaja.

(ix) SP3 - (AR Vol 2 p 39)- Masjid di bawah 4 kariah dan juga digunakan orang awam juga. Sebahagian AJK masjid adalah orang awam.

(x) SP2 (*sic* - should be Defence Witness no. 2) - (AR Vol 2 p 66) - Dalam kem adalah Kawasan larangan. Masjid juga di dalam Kawasan larangan.

(xi) SP2 - (*sic* - should be Defence Witness no. 2) (AR Vol 2 p 67) - Masjid di PGA ini boleh digunakan oleh anggota, kakitangan awam dan orang awam jika dapat kebenaran. Kebenaran iaitu di sekitar kem terdapat banyak bekas anggota polis dan mereka berada di masjid itu. Kebiasaannya ada pas keluar masuk diberikan. Pas dari bilik pengawal.

(xii) SP2 - (*sic* - should be Defence Witness no. 2) (AR Vol 2 p 67) - Setuju orang awam yang dapat kebenaran masuk boleh masuk ke kawasan masjid ini? Saya setuju.

(xiii) SP2 - (*sic* - should be Defence Witness no. 2) (AR Vol 2 p 67) - Ya, orang lain boleh masuk ke kawasan kem selain dari anggota PGA setelah dapat kebenaran dari bilik Pengawal.

(xiv) SP2 - (*sic* - should be Defence Witness no. 2) (AR Vol 2 p 67) - Hari Jumaat ada solat Jumaat maka tiada perlu ambil pas untuk memasuki ke kawasan tersebut.

(xv) SP2 - (*sic* - should be Defence Witness no. 2) (AR Vol 2 p 68)- Setuju pada hari Jumaat orang awam boleh masuk untuk solat Jumaat? Setuju. Rujuk D23a (the photo on the Kawasan Larangan). Notis ini bermakna kawasan ini tidak boleh bebas untuk keluar masuk kecuali dapat kebenaran.

(xvi) SP2 - (*sic* - should be Defence Witness no. 2) (AR Vol 2 p 68) - Kawasan kem adalah kawasan larangan dan bukan tempat awam.

[31] From the evidence led, it is a fact that although the mosque is within a gazetted protected area and place, members of the public are allowed to go to the mosque upon securing permission.

Court's Decision

[32] It was then for the court to decide whether it is a public place caught by the provisions of s. 6(1) of Act 357.

[33] The court agreed with the submissions of the appellant that as the term 'public place' is not defined in Act 357, the court should turn to the Interpretation Acts 1948 and 1967 to construe the phrase as there is a definition for 'public place' contained therein. For ease of reading, the definition for public place provided by the Interpretation Acts 1948 and 1967 is set out again hereunder:

> "public place" includes every public highway, street, road, bridge, square, court, alley, lane, bridle way, footway, parade, wharf, jetty, quay, public garden or open space, and every theatre, place of public entertainment of any kind or other place of general resort to which admission is obtained by payment or to which the public have access.

[34] The appellant, had placed emphasis on only the words "to which the public have access". However, the definition uses the word "includes" which means that it is a non-exhaustive definition. In *Yii Ming Tung v. PP* [2014] 9 CLJ 1102; [2015] 3 MLJ 596 CA Abdul Aziz Rahim JCA held at para [24]:

> The two cases cited above supports the view that the usage of the word "includes" in the drafting of the definition 'government medical officer' or 'medical officer' in s. 2 of the CPC shows that the definition is non exhaustive as compared to the usage of the word 'means' which indicates an exhaustive definition.

[35] The definition includes "any place of general resort to which admission is obtained by payment". In *Mohamad Khairul Azrin Khairi lwn. PP & Kes Satu Lagi* [2017] 1 LNS 1087; MLJU 1337, where the accused was charged with a similar charge under s. 6(1) of Act 357, Asmadi Hussin JC held at para [13];

> Pada pandangan saya, maksud yang biasa bagi "public place" adalah mana-mana tempat di mana orang awam ada atau boleh ada akses kepadanya. Sama ada mereka berhak dari segi undang-undang untuk ke situ adalah tidak relevan.

[36] This court would not go so far as in the *Mohamad Khairul Azrin*'s case but would hold that the interpretation of the term "public place" ought to be one that is wide enough to include a place where the public can secure regulated admission such as by payment, by permission with or without conditions. This is consonant with the meaning of a public place found in Stroud's *"Judicial Dictionary of Words and Phrases"*, 6th edn, vol. 2 as being "a place to which the public can and do have access, it doesn't matter whether they come at the invitation of the occupier or merely with his permission, or whether some payment or the performance or some formality is required before access can be had" (*R v. Kane* [1965] 1 All ER 705), a meaning which has also appealed to Anselm Charles Fernandis JC (now judge) in *Md Ariff Muzaker Riduan lwn. PP* [2017] 1 LNS 595 which is also a case involving a charge under s. 6(1) of Act 357.

[37] From the evidence led, the court had no hesitation in holding that Masjid Saidina Abu Bakar Ulu Kinta located within the police camp, Markas Briged Utara Pasukan Gerakan Am is a public place as the public can have access to it, *albeit* with permission.

[38] Such an interpretation would promote the intention of the Act 357 in the interest of the safety of the public in general in dealing with the presence of corrosive and explosive substances in a public place and reliance is placed upon s. 17A of the Interpretation Acts 1948 and 1967 where a mode of construction which would promote the purpose or object underlying the Act whether expressly stated or not shall be preferred to that of a construction that would not, see *Selva Vinayagam Sures v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2020] 1 LNS 1707 FC at paras. [39] to [41]. In the case of Act 357, it is expressly stated in its preamble to be an Act to provide certain penalties for unlawful possession of corrosive and explosive substances and the carrying of offensive weapons and such a purpose or object should be at the forefront of the mind of the court when hearing cases of this nature, see *Selva Vinayagam Sures* (*supra* at para. [42]).

Alleged Failure Of Trial Judge To Explain Availability Of The Three Options

[39] Pursuant to s. 173(ha) of the Criminal Procedure Code ("CPC") if the trial judge finds that the prosecution has made out a *prima facie* case against the accused before calling upon the accused to enter his defence, the trial judge has to explain the three options of defence to the accused.

[40] The three options available to the accused are that he has: (1) a right to remain silent; (2) a right to give unsworn evidence; or (3) a right to give sworn evidence. Whichever option he chooses, the accused is entitled to call witnesses.

[41] In the grounds of judgment of the trial judge, the learned Sessions Court Judge said (AR Vol 1 p 21) that she had explained the three options to the appellant. Although mention was made by the learned Sessions Court Judge of the need for the prosecution to make out a *prima facie* case at the conclusion of the prosecution case by referring to s. 180(1) CPC which comes under Chapter XX on Trials Before The High Court, such a reference would not have caused any prejudice to the appellant because a similar provision applicable to trials before the Magistrate's Court and Sessions Court can be found in s. 173(f)(i) CPC.

[42] During the hearing of the appeal before this court on 13 October 2020, learned counsel for the appellant submitted that there was a failure by the learned Sessions Court Judge to comply with the aforesaid provisions of s. 173(ha) CPC. The learned Deputy Public Prosecutor replied that this ground was not raised in the appellant's petition for appeal.

[43] After hearing the appeal, the court reserved decision and adjourned the matter to 13 November 2020 to deliver its decision.

[44] In the interim, by letter dated 20 October 2020 to the court, the appellant's counsel asserted based upon the notes of proceedings (AR Vol 2 pp. 57 to 59) and a review of the court recording transcription ("CRT recording") for the relevant dates of 27 March 2019 (the date the learned trial judge found that the prosecution had made out a *prima facie* case against the accused); of 17 April 2019 (the first date that the accused was to enter and open his defence but adjourned by reason of the counsel for the accused being taken ill) and of 22 April 2019 (the second date that the accused was to enter and open his defence) that the learned Sessions Court Judge had failed to explain the options available to the accused. By reason thereto, the appellant submitted that:

> we strongly believe that this is a serious irregularity of proceedings which is fatal under the law as the s. 173(ha) of the Act clearly and expressly states the following:

(ha) When the court calls upon the accused to enter on his defence under subparagraph (h) (i), the court shall read and explain, the three options to the accused which, are as follows:

(i) to give sworn evidence in the witness box;

(ii) to give unsworn statement from the dock; or

(iii) to remain silent.

[45] The appellant's counsel relying upon ss. 323 and 325 of the CPC called upon me to practice (*sic*) my revisionary powers provided therein. The provisions of ss. 323 and 325 of the CPC are reproduced below:

323. Powers to call for records of subordinate courts.

(1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of that subordinate court.

(2) ...

325. Powers of Judge on revision.

(1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by ss. 311, 315, 316 and 317 of this Code.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.

[46] In summary, ss. 311, 315, 316 and 317 of the CPC provide the judge, which would include a Judicial Commissioner (see art. 122AB(1) of the Federal Constitution), with the power to make an order to stay execution of any judgment, order, conviction or sentence, issue a warrant of arrest, reverse the order of acquittal [of the subordinate court] and direct a further inquiry or that the accused be re-tried or find him guilty and pass sentence or reverse an order of conviction and acquit or discharge the accused or order him to be re-tried, or alter the finding, maintaining the sentence or enhance the sentence or alter the nature of the sentence and order additional evidence to be taken by himself or by the Magistrate or the Sessions Court Judge.

[47] It would be useful to add that s. 326 of the CPC provides that no party has any right to be heard, either personally or by advocate, before a judge when exercising his powers of revision, provided that the judge may, if he thinks fit, when exercising such powers hear any party, either personally or by advocate unless an order is made to the prejudice of the accused.

[48] Upon receipt of the aforesaid letter of 20 October 2020, I called for the CRT recording for all the three days and reviewed the same together with the learned Deputy Registrar, Puan Zulyana binti Zollkapli. The court could make out that on 27 March 2019 after the learned Sessions Court Judge had given her decision, the interpreter could be seen going up to the accused who was dressed in a dark blue shirt and who was in the dock and speaking to the accused. From the recording of 17 April 2020, the interpreter could be heard saying that "Tiga pilihan telah diterangkan pada tarikh yang lepas" (the three options had been explained to the accused on the previous date.

[49] The court is, therefore, satisfied that the three options had been explained to the appellant and the assertion of there being a serious irregularity in the proceedings by reason of a failure to do so is wholly misplaced and unmeritorious.

[50] Be that as it may, even if the assertion by the appellant is true but which is not, it has been settled by the Court of Appeal in *Hamzah Osman lwn. PP* [2016] 5 CLJ 18 and held by the High Court in *Marimuthu Seringan lwn. PP* [2016] 1 LNS 64 that a failure to explain the options available to the accused is not fatal if the accused was represented by counsel. In this case, the accused was indeed represented by an experienced counsel and in the circumstances, any failure to explain the three options would not in any event have caused any prejudice to the appellant.

Sentencing

[51] Although the notice of appeal of the appellant (AR Vol 1 p 3) stated that he was appealing against the whole of the Sessions Court judgment (conviction and sentence), no submissions whatsoever, both written and oral, were made on the sentence handed down on the appellant. Nonetheless, the court proceeded to consider whether the sentence ought to be reduced.

[52] Upon conviction under s. 6(1) of Act 357, the sentence that is to be imposed is a term of imprisonment of not less than five years and not more than ten years and to whipping. The appellant was sentenced to seven years imprisonment and one stroke of whipping.

[53] The court observed that in passing sentence, the learned Sessions Court Judge had taken into account the appellant having no prior conviction, that the offence was a serious one and the prosecution having pressed for a heavy sentence. In the circumstances, with the added factor of the offence having taken place in the vicinity of a place of worship, the court found no reason to disturb the sentence.

Conclusion

[54] Wherefore, the court dismissed the appeal of the appellant. The decision for this appeal was originally scheduled to be delivered on 13 November 2020 but was adjourned to 14 December 2020 by reason of the Conditional Movement Control Order made by reason of the global COVID-19 pandemic.

[55] After delivery of the decision and upon learned counsel for the appellant's oral application to stay the execution of the sentence pending an appeal to the Court of Appeal, the court allowed a stay with the appellant being required to post bail to the sum of RM10,000 because if the sentence is carried out, the position of the appellant cannot be restored in the event the appeal is allowed.